Supreme Court, U.S.
FILED

No. 96-355 AUG 30 1996

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, *Petitioner*,

v.

MICHAEL ANGELO MORALES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(CAPITAL CASE)

Do federalism concerns apply in a habeas corpus action brought under 28 U.S.C. section 2254 so that a federal court must honor a State's sovereign authority to create and apply its own neutral discretionary rules of procedure, rendering a federal claim forfeited, as long as the State's invocation of the rule does not evade or is not pre-empted by federal law?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No.

ARTHUR CALDERON, *Petitioner*,

v.

MICHAEL ANGELO MORALES, *Respondent*.

Arthur Calderon, Warden of California State Prison at San Quentin, ("the warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996), reversing the district court's dismissal of 37 claims presented in a petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254. A copy of that decision is attached as Appendix A to this petition for writ of certiorari. The order of the United States District Court for the Centr. District of California that dismissed the 37 habeas claims is unreported and is reproduced and attached as Appendix B.

STATEMENT OF JURISDICTION

The warden timely invokes the Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 4, 1996.

CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On April 7, 1983, a jury in the Superior Court of California for the County of Ventura convicted respondent Morales ("Morales") of the first degree murder of Terri W., conspiracy to commit the murder of Terri W., and the rape of Terri W. Cal. Pen. Code §§ 182, 187, 261. The jury further found true two death-eligible special circumstances, (1) that Morales intentionally tortured Terri W., and (2) that Morales had committed the murder by means of lying-in-wait. Cal. Pen. Code § 190.2.

On April 25, 1983, that same jury found that the aggravating factors outweighed the mitigating factors and returned a death verdict. On June 14, 1983, the Superior Court denied Morales's motion to reduce the verdict from death to life without parole. On April 6, 1989, the California Supreme Court affirmed the judgment of conviction and sentence in its entirety except that it reversed a trial court ruling of a judgment n.o.v. On June 1, 1989, the California Supreme Court denied rehearing and modified language in the opinion. People v. Morales, 770 P.2d 244 (1989).

On June 6, 1989, the California Supreme Court adopted policies that governed the litigation of capital cases before that court. The policies were adopted for the express purposes of

> "(i) ensuring that potentially meritorious habeas corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses; and (iii) providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to

investigate and file habeas corpus petitions." Policy 3.

The policies were expressly effective June 6, 1989 to all habeas corpus petitions, "whether the appeals therefrom are pending or previously resolved." Policy 3. The policies explained that the California Supreme Court's appointment of counsel for a person under a sentence of death is for representation in the direct appeal, the preparation and filing of habeas corpus petitions, the preparation and filing of a petition for writ of certiorari in the United States Supreme Court, proceedings related to the setting of an execution date, and clemency proceedings before the Governor of California. Policy 3 Standard 2-1. The policies did not allow the withdrawal of counsel of record absent the presence of substitute counsel. Policy 2.

The policies adopted timeliness standards by imposing on appellate counsel in capital cases "a duty to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus." Policy 3, Standard 1-1. The policies explicitly incorporated existing California law, as set out in *In re Stankewitz*, 708 P.2d 1260, 1262 n.1 (1985), requiring the presentation of habeas corpus claims without substantial unjustified delay. Policy 3, Standard 1-1.3. The policies also required appellate counsel to file in the California Supreme Court "on or before the date the appellant's opening brief on appeal is filed, or within 120 days after the date on which these standards are announced, whichever is later" a "Confidential request for expenses to investigate potential habeas corpus issues." Policy 3, Standard 2-3. The policies also allowed without prior court approval the expenditure of $3,000 for reasonable expenses and legal fees associated with the request for investigative expenses. Policy 3, Standard 2-6.

On November 27, 1989, the Court denied certiorari in Morales' appeal. Morales v. California, 493 U.S. 984 (1989).

On July 20, 1992, Morales filed a petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254 in the United States District Court, Central District, raising 53 claims. On September 28, 1992, the Warden filed a motion to dismiss the petition for writ of habeas corpus. On November 16, 1992, the district court granted in part the Warden's motion to dismiss, dismissing 33 of the claims in the petition, and ordering an answer to the remaining 20 claims in the petition. On December 27, 1992, the Warden filed an answer to the 20 claims and a memorandum of points and authorities in support thereof.

On December 16, 1992, Morales filed a petition for writ of habeas corpus in the California Supreme Court. In April, 1993, Morales filed a "supplemental" petition for writ of habeas corpus. On July 28, 1993, the California Supreme Court denied Morales's two habeas corpus petitions in separate identical orders that read:

> Petition for writ of habeas corpus DENIED on the merits and as untimely. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal.3d 391, 396, fn.1.)
>
> Mosk, J. is of the opinion that an order to show cause should issue.

On January 14, 1994, Morales filed a first amended petition for writ of habeas corpus in federal court. This amended petition raised 37 claims that were raised in the California Supreme Court in the December 1992 and April 1993 habeas petitions. The amended petition also contained 2 claims, that had never been

presented by Morales to any state or federal court[1]. The amended petition also realleged the 20 claims from Morales's first petition for writ of habeas corpus that had already been answered by the Warden and traversed by Morales.

On March 14, 1994, the Warden filed a motion to dismiss the entire first amended petition for writ of habeas corpus. The district court granted the motion. The court found 37 claims procedurally barred. In particular, the court found claims Number 1 through 15, 17, 19, 24, 26 through 30, 33 through 42, 50, 55, 58, and 59 procedurally barred. The Court found that these particular claims were raised in the California Supreme Court in the habeas corpus petitions filed in that court in December 1992 and in April 1993. The court also found that the two California Supreme Court orders in each of those two cases clearly and explicitly denied all of petitioner's 37 state habeas corpus claims "as untimely" under California law.

The district court found that the delay rule invoked in this case was a longstanding California rule governing habeas corpus petitions and that California case law identified limited circumstances where substantial delay could be justified. The court found that where a habeas corpus petitioner is acting as his own counsel and is both uneducated and lacking knowledge of the law, California case law had accepted such circumstances as exceptional. The court found that Morales "has been represented by counsel in the California Supreme Court continuously throughout his appeal to date, and for that reason, appears to fall outside the exception identified under California law."

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1. These claims are not before this Court because they have been withdrawn. Morales v. Calderon, 85 F.3d 1387, 1389 n.4 & n.5 (9th Cir. 1996).

The district court also found that the two procedural bars invoked by the California Supreme Court were adequate to support its judgment in the two state habeas corpus actions. Relying in part on the Court's decision in Howlett v. Rose, 496 U.S. 356 (1990), the court found that the rules invoked by the California Supreme Court in this case were neutral discretionary rules of judicial administration that formed a "valid excuse" for the state court's timeliness bar. The court found no evidence that the California Supreme Court had evaded its obligation to enforce the Constitution or had discriminated against the presentation of federal questions.

The court also found that Morales' showing that the California Supreme Court had not invoked procedural bars against other state habeas corpus petitioners in some other cases did "not reveal any improper 'discrimination' under the Supremacy Clause against federal constitutional claims." The court also found that "to the extent that California law and the practice of the California Supreme Court may allow unjustifiably delayed federal constitutional claims to be heard on the merits, the law and the practice reflect state judicial receptiveness to, not hostility toward, the presentation of federal constitutional claims." Relying on Prihoda v. McCautry, 910 F.2d 1379, 1384, (7th Cir. 1990), the court found that California's delay rule was firmly established and that to disregard the invocation of the rule because the state court "sometimes allows otherwise untimely federal constitutional claims to be heard on the merits," would "induce the California Supreme Court to make its habeas corpus procedural rules 'draconian rather than to allow prisoners the latitude now available.'"

The district court also dismissed as procedurally defaulted two claims that had never been presented to

the California Supreme Court, finding, based on the California Supreme Court's two procedural bar orders already before the district court, a reasonable basis to conclude that these claims were likewise defaulted. The Court found that Morales had made an inadequate showing of cause and prejudice and a miscarriage of justice, but allowed Morales to make a more particularized showing of cause and prejudice or miscarriage of justice.[2/]

The United States Court of Appeals reversed. The court found that the adequate state ground doctrine did not require "a showing of deliberate manipulation to avoid federal review." Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996). The court stated "that the issue here is not whether the State is allowed to invoke its rule irregularly for its own purposes," but rather, relying on the Court's non-habeas decisions in Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) and Barr v. City of Columbia, 378 U.S. 146, 149 (1964), the issue was whether the state rules were "strictly or regularly followed." The court found that this "Court has added

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2. On August 18, 1994, Morales moved the district court to reconsider its earlier ruling based on the theory that there had been a change in law. In particular, Morales urged that the decision in Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied _ U.S. __, 130 L. Ed. 2d 1127 (1995) required the court to find the procedural bars invoked inadequate. The district court denied the motion. The court found Siripongs distinguishable. In particular, the court found that the order challenged in Siripongs, unlike the order in this case, failed to actually identify any particular procedural rule as a basis of any default. The district court also found Siripongs was distinguishable on the basis that the case involved a second or piecemeal petition, governed by particular state procedural rules, whereas this case involves a delayed first petition, governed by the state's timeliness rule.

no requirement of a showing of manipulative intent on the part of the state court." Id. at 1392.

The Ninth Circuit Court of Appeals also held that the California Supreme Court had not firmly established or strictly or regularly applied its timeliness rules. Id. at 1392-93. However, the court did not make any actual findings that the California Supreme Court had failed in other cases to strictly and regularly apply its state habeas rules. The court conceded that it did not know how to interpret a series of summary denial orders in other California Supreme Court capital habeas cases presented by Morales that "may indeed represent consistent exercises of discretion," id. at 1392, and instead predicated its conclusion that the timeliness rules were neither well-established nor strictly or regularly applied based on the nature of the rules themselves.

The court found it "difficult to articulate California's timeliness requirements as they applied" to Morales' state habeas corpus petitions filed almost ten years after his conviction and more than three-and-one-half years after conclusion of his appeal. Id. at 1390. The court found that California's rule requiring habeas petitions be filed without substantial unjustified delay and the California Supreme Court Policies requiring investigation and presentation of habeas claims without substantial delay or good cause "did not provide petitioner with adequate notice of when his claims would be barred." Id. at 1393. The court premised its findings of lack of firmly established and strictly or regularly applied timeliness rules on its view that neither the California Supreme Court Policies governing capital habeas petitions nor the longstanding substantial delay rule "established what amount of delay the court would consider 'substantial,' nor did either set out criteria for determining 'good cause' to excuse such delay." Id. at 1391.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case involves Morales' default of 37 constitutional claims that were first brought on state collateral attack almost ten years after his judgment of conviction and more than three-and-one-half years after the California Supreme Court decided his direct appeal. These facts present the Court with a substantial question of national importance by requiring the Court to define for the very first time in a federal habeas setting the amount of deference a federal court should give a State's invocation of a procedural bar in recognition of the State's sovereign power to create and invoke its own neutral rules of procedure. The Court has never before been called upon to decide whether the principles of comity and federalism affect either the nature or the application of the adequate state ground test in an action filed under 28 U.S.C. section 2254.

The Court's case law in non-habeas corpus cases sets forth tests for the adequacy of a state ground that vary in the degree of deference that is paid to a State court's invocation of procedural bars. One formulation of the test in non-habeas cases is quite deferential and honors state procedural bars as long as the bar has not been invoked to evade federal law or is not preempted by federal law. Another formulation in non-habeas cases is less deferential and demands of State courts that they firmly establish and regularly and consistently apply state procedural bars before federal courts are required to honor their invocation. This less-deferential test was born in a number of the Court's civil rights cases where procedural bars were invoked with pointless and meaningless severity and is found in a number of other non-habeas cases.

The Ninth Circuit Court of Appeals has taken this less deferential formulation of the doctrine and

applied it in an unprecedented manner. The court found no pointless, meaningless, or severly novel interpretations of California law. Indeed, the court did not make any actual findings that the California Supreme Court had failed in other habeas cases to apply strictly and regularly its timeliness rules. Instead, conceded that it could not know from Morales' showing that there had been irregular or inconsistent application, and predicated its inadequacy finding on its judgment that the elements of the timeliness rules did not give Morales adequate notice of when his claims would be barred.

Certiorari should be granted because adoption of the evasion or pre-emption formulation of the adequate state ground doctrine is necessary (1) to afford sufficient deference to California's sovereign right under the Tenth Amendment of the Constitution to create and invoke timeliness rules that apply to state collateral attacks on death penalty judgments, (2) to afford sufficient deference to the federalism and comity concerns unique to habeas corpus cases under 28 U.S.C. section 2254, and (3) to make the Ninth Circuit Court of Appeals decision consistent with the Court's prior cases regarding "firmly established" and "strict" and "regular" enforcement of state rules. This case presents an important question of federal law, unresolved by this Court, with especially far-reaching impact in collateral attacks on state death penalty judgments.

ARGUMENT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW OF NATIONAL SIGNIFICANCE BECAUSE THE COURT HAS NEVER BEFORE DEFINED THE AMOUNT OF DEFERENCE DUE A STATE COURT'S INVOCATION OF A PROCEDURAL BAR UNDER THE ADEQUATE STATE GROUND DOCTRINE IN FEDERAL HABEAS CORPUS PROCEEDINGS BROUGHT BY A STATE PRISONER

> "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the power granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."

United States v. Lopez, __ U.S. __, 131 L. Ed. 2d 626, 642 (1995) quoting McCulloch v. Maryland, 4 Wheat 316 (1819).

The case at bar involves the California Supreme Court's invocation of two timeliness bars to the presentation of constitutional claims brought by Morales on state collateral attack almost ten years after his conviction and more than three-and-one-half years after the termination of Morales' direct appeal. These facts present the Court with a question "perpetually arising" in federal courts in habeas corpus cases brought under 28 U.S.C. section 2254.

The adequate and independent state ground doctrine is a rule that defines the constitutional balance

between federal and state sovereignty and "accords respect to state courts as decisionmakers by honoring their modes of procedure." Howlett v. Rose, 496 U.S. 356, 370 n.16 (1990). The doctrine has been in existence for well over 100 years. Murdock v. City of Memphis, 87 U.S. 590 (1875). However, lower federal courts lack guidance in this area of law because the Court's application of the doctrine to federal habeas corpus proceedings brought by prisoners in State custody has been, by the Court's own admission, "somewhat tortuous." Wainwright v. Sykes, 433 U.S. 72, 82 (1977).

The warden respectfully calls upon the Court to articulate for the first time the precepts that define the "distinction between what is truly national and what is truly local," United States v. Lopez, __ U.S. __, 131 L. Ed. 2d at 643, for lower federal courts attempting to decide on federal habeas whether a state procedural bar is adequate. This question of first impression provides the Court the opportunity to advise lower federal courts whether the nature and application of the doctrine in federal habeas proceedings under 28 U.S.C. section 2254 is any different from the nature and application of that doctrine in non-habeas proceedings.

A. The Adequate State Ground Doctrine In Habeas Corpus Proceedings Under 28 U.S.C Section 2254

A brief review of the history of the adequate state ground doctrine in the habeas context reveals that the Court has never been called upon to define the national versus local constitutional distinction in a section 2254 case. As recognized by the Court in Wainwright, the earliest "pertinent decisions" on the subject are Ex parte Spencer, 288 U.S. 652 (1913) and Brown v. Allen, 344 U.S. 443 (1953).

In Spencer, the Court dismissed as untimely a petition for writ of habeas corpus filed by a prisoner in state custody. In particular, the habeas petitioner alleged that his sentence constituted an ex post facto punishment under the Constitution. The Court refused to hear the state prisoner's claim by employing the "often expressed" rule "that the writ of habeas corpus is not to be used as a writ of error." The Court held that petitioner's failure to avail himself of multiple opportunities to raise his claim in the state courts barred consideration of the claim on habeas corpus. Ex parte Spencer, 288 U.S. at 659-60; id. at 663.

In Brown v. Allen, the Court, relying in part on Spencer, refused to hear an array of constitutional issues because the state appeal of one petitioner in that case had been dismissed when the statement of appeal was filed one day late. Finding the state rule virtually identical to its own rule for perfecting appeals, the Court found the rule to be an independent and adequate state ground. 344 U.S. at 485-87.

This changed, of course, in Fay v. Noia, 372 U.S. 391 (1963), where the Court overruled Brown, and held that the adequate and independent state ground doctrine did not extend "'to limit the power granted the federal courts under the federal habeas statute.'" Wainwright v. Sykes, 433 U.S. at 82-83 quoting Fay v. Noia, 372 U.S. at 399. In Fay, another instance involving a failure to file an appeal, the Court created a discretionary standard that denied federal review only to those "who had deliberately by-passed the orderly procedure of the state courts" and had effected an actual knowing waiver, "an intentional relinquishment or abandonment of a known right or privilege," of federal claims. Fay, 372 U.S. at 438, 439. In so doing, the Court held that "the exigencies of federalism" encompassed in "the State's valid interest in orderly

procedure" were sufficiently vindicated by the forfeiture of state, but only state, remedies. Id. at 433.

Thirteen years later, the Court effectively limited Fay to its facts in Francis v. Henderson, 425 U.S. 536 (1976), holding that "considerations of comity and federalism" required federal courts to honor a state procedural rule requiring pretrial objections to grand jury impanelments to the same degree federal courts honored a similar federal procedural rule, by barring the defaulted claim in the absence of a showing of "cause" and "prejudice." In so doing, the Court acknowledged Louisiana's longstanding requirement of bringing challenges to the grand jury composition prior to trial, 425 U.S. at 540-41, but undertook no inquiry whether the state court had itself "strictly or regularly followed" this rule of procedure. Cf. Barr v. City of Columbia, 378 U.S. 146, 149 (1964). Indeed, in order to reach the issue in Francis, the Court assumed the adequacy of the state bar. See Francis, 425 U.S. at 543 (Brennan J., dissenting) ("'even when state procedural grounds are adequate . . ., federal habeas corpus relief is nonetheless available.'") (emphasis omitted).

The following year, the Court further confined the effects of Fay. Wainwright v. Sykes, 433 U.S. 72, explicitly rejected "the sweeping language of *Fay v. Noia*" as applied to a state contemporaneous objection requirement "both for the fact that it is employed by a coordinate jurisdiction within the federal system and the many interests which it serves in its own right." 433 U.S. at 87-88. Thus, the Court did not apply the "deliberate bypass" and "knowing waiver" test and instead found that "[t]he 'cause'-and-'prejudice' exception of the *Francis* rule will afford an adequate guarantee [of constitutional rights under section 2254]." 433 U.S. at 90-91. Once again, the Court did not consider whether the state court had

"strictly or regularly" applied its contemporaneous objection rule[3].

Finally, in 1991, the Court expressly overruled Fay in Coleman v. Thompson, 501 U.S. 722 (1991), when it honored the dismissal of a state habeas appeal based on the untimely filing of the notice of appeal. Again, the Court assumed the adequacy of the state procedural default without inquiry into the regularity and consistency of the State's invocation of the bar. 501 U.S. at 750. In fact, the Court expressly declined to consider the adequacy of the state ground. Id. at 744.

The foregoing reveals that the Court has never held, on federal habeas review under section 2254, that a state procedural bar is inadequate because it is not firmly established and regularly applied.[4] The Court has never been called upon to decide in the habeas

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3. This Court rejected the habeas petitioner's argument that the state "did not actually have a contemporaneous-objection rule" based on the "unmistakable terms" of the rule, the state appellate courts' refusal to hear the claim, and a line of state authorities interpreting the rule as a contemporaneous objection requirement. Wainwright, 433 U.S. at 85-86.

4. Once, in Dugger v. Adams, 489 U.S. 401 (1989), the Court *rejected* in a footnote a habeas petitioner's claim that the State court had failed to apply its procedural rule consistently and regularly. The Court found that the challenged rule had been applied "[i]n the vast majority of cases" and the noted state cases to the contrary were not "sufficient to undercut the adequacy" of the state procedural rule. Dugger, 489 U.S. at 410-12 n.6. In a non-habeas case, however, the Court has held that an assumed erroneous application of state law in declining to rule on a federal claim does not establish the lack of strict or regular enforcement of the rule where the claimant fails to substantiate any claim that the state courts in general applied the law in an irregular, arbitrary, or inconsistent manner. Jimmy Swaggart Ministries v. California Board of Equalization, 493 U.S. 378, 397-98 (1990).

context what is sufficient to undercut the adequacy of a state procedural bar.

The case at bar provides the Court with the opportunity to decide whether the adequate state ground doctrine, which itself is a principle premised on federalism teachings, see United States v. Lopez, __ U.S. __, 131 L. Ed. 2d at 650 (Kennedy J., concurring), should be applied, because of federalism precepts unique to section 2254 cases, in a different manner from how the Court has applied the rule in non-habeas corpus settings. Indeed, now that the Court has fully abandoned the Fay model of federalism wherein "the State's valid interest in orderly procedure" was once considered sufficiently vindicated by the forfeiture of State, but not federal, remedies, Fay v. Noia, 372 U.S. at 433, this case calls upon the Court to articulate a model of federalism under the Supremacy Clause and the Tenth Amendment of the Constitution that honors a State's invocation of a procedural bar so long as the invocation of the state rule does not evade or is not pre-empted by federal law.

B. The Adequate State Ground Doctrine In Non-Habeas Corpus Cases

The Court's articulation of federalism principles in the adequate state ground doctrine in non-habeas proceedings vary in the degree of deference given to a state court's determination of state law questions that preclude review of federal questions. On one hand, the Court has articulated the highly deferential view of state courts wherein "it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe [state] . . . laws correctly." Murdock v. City of Memphis, 87 U.S. at 626. This view, which was adopted by the district court in this case, honors state court decisions

predicated on state law that preclude adjudication of federal questions so long as the invocation of state rules was not "set up as an evasion" of federal law, Rogers v. Alabama, 192 U.S. 226, 231 (1904), or does not reflect an "intent to avoid the Federal questions," Vandalia Railroad v. South Bend, 207 U.S. 359, 367 (1907), or "unless those [state] rules are pre-empted by federal law. Howlett v. Rose, 496 U.S. at 372.

At other times, the Court in non-habeas cases has articulated standards governing the adequate state ground doctrine which do not focus on evasion or pre-emption, but rather assume plenary review of the federal question simply because the State's invocation of a procedural rule appears to be discretionary, Sullivan v. Little Hunting Park, 396 U.S. 229, 234 (1969); Williams v. Georgia, 349 U.S. 375, 383 (1955), or has not been "strictly or regularly followed," Barr v. City of Columbia, 378 U.S. at 149, or may have been invoked for the first time, Johnson v. Mississippi, 486 U.S. 578, 588 (1988). The United States Court of Appeals for the Ninth Circuit invoked this view in finding California's timeliness rules in habeas corpus cases were inadequate because the California Supreme Court had failed to apply those rules in a well-settled, regular and consistent manner.

This case therefore presents the Court with the opportunity to advise lower federal courts that a State's invocation of a procedural bar is entitled to deference so long as the bar has not been invoked to evade the presentation of a federal question or the bar has not been pre-empted by federal law.

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C. Certiorari Should Be Granted Because Adoption Of The Evasion And Pre-emption Formulation Of The Adequate State Ground Doctrine Is Necessary To Afford Sufficient Deference To California's Sovereign Right To Create And Invoke Procedural Rules Under The Tenth Amendment And The Supremacy Clause Of The Constitution

First, certiorari should be granted because this case presents an important question of national significance involving the States' administration of its criminal laws and procedure. This is an area traditionally where the States are recognized as sovereign under the Tenth Amendment. As the Court recently declared: "it is normally 'within the power of the state to regulate procedures under which its laws are carried out . . . .'" Montana v. Egelhoff, __ U.S. __, 135 L. Ed. 2d 361, 368 (1996) (opinion of Scalia, J.).

Here, the California Supreme Court exercised its power to "regulate procedures under which its laws are carried out" when it invoked two habeas corpus timeliness rules to bar Morales' two state habeas petitions filed almost ten years after his conviction and more than three-and-one-half years after conclusion of Morales' direct appeal. This exercise of State power illustrates "'the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause.'" Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

The Ninth Circuit Court of Appeals rejection of these two timeliness bars as inadequate requires the Court to decide whether the Ninth Circuit can ignore these sovereign rules when Morales has provided no reason to suggest that the California Supreme Court invoked the bars to evade federal law or that federal law

pre-empted the bars and simply because the Ninth Circuit holds the subjective and novel view that the nature of the rules themselves fails to give Morales "adequate notice of when his claims would be barred." Morales v. Calderon, 85 F.3d at 1393.

A substantive evaluation of California's timeliness bars as to whether the rules give "fair" or "adequate" notice of when collateral attacks on criminal judgments will be barred runs afoul of the axiom that a federal court cannot "substitute its own view of what should be the better rule, for that of the state court." Demorest v. City Bank Company, 321 U.S. 36, 42 (1944).

D. Certiorari Should Be Granted Because Adoption Of The Evasion And Pre-emption Formulation Of The Adequate State Ground Doctrine Is Necessary To Afford Sufficient Deference To The Comity And Federalism Concerns Unique To Habeas Corpus Cases Under 28 U.S.C. Section 2254

Second, in addition to the fact that this case involves a question within the traditional realm of state sovereignty, certiorari should be granted because this case presents an important question of national importance governing the scope of the writ of habeas corpus brought by prisoners in state custody. The Court has used as a benchmark for measuring the scope of the writ under section 2254 the States' interest in finality of criminal judgments. "'The interest in leaving concluded litigation in a state of repose'" free from "'further judicial revision'" has played a defining role in shaping the scope of the writ. Teague v. Lane, 489 U.S. 288, 306 (1989) (opinion of O'Connor, J.); accord, Butler v. McKeller, 494 U.S. 407, 412 (1990). Indeed, this defining distinction between direct and collateral review of state criminal judgments has become so prominent that it now,

in the Court's view, "resounds throughout our habeas jurisprudence." Brecht v. Abrahamson, 507 U.S. 619, 633 (1993).

Thus, this case requires the Court to decide whether the States' interest in finality of its criminal judgments make it necessary to adopt an evasion or pre-emption formulation of the adequate state ground doctrine in order to protect the States' interest in finality of its criminal judgments. The Court has used finality of state criminal judgments as the basis for often applying "different standards on habeas than would be applied on direct review." Brecht, 507 U.S. at 634; e.g. id. at 633-37 (applying less stringent harmless error standard on collateral review); Teague v. Lane, 489 U.S. at 305-10 (opinion of O'Connor, J.) (new rules of constitutional law do not have retroactive effect on collateral review except in limited circumstances); Pennsylvania v. Finley, 481 U.S. 551, 555-56 (1987) (no constitutional right to counsel on collateral review).

Such finality considerations might require a more deferential standard of adequacy applied on federal habeas review of state procedural bars than would be applied on direct review of those same procedural bars. "Indeed, this interest in finality might well lead to a decision to exclude completely certain legal issues, whether or not properly determined under the law prevailing at the time of trial, from cognizance of courts administering this collateral remedy [under section 2254]." Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan J., concurring in part and dissenting in part).

The warden respectfully submits that the finality concerns that now "resound throughout" the Court's habeas jurisprudence weigh heavily enough for the Court to decide now that a highly deferential adequate state ground test that honors all procedural bars except in cases of evasion or pre-emption combined with "[t]he

'cause'-and-'prejudice' exception of the *Francis* [v. Henderson] rule will afford an adequate guarantee [of constitutional rights under section 2254]." Wainwright v. Sykes, 433 U.S. at 90-91. This is especially true since "the procedural default rule of Wainwright v. Sykes has its historical and theoretical basis in the 'adequate and independent state ground' doctrine." Harris v. Reed, 489 U.S. 255, 260 (1989).

In Francis v. Henderson, 425 U.S. 536, the Court found "'no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants.'" 425 U.S. at 542. The Ninth Circuit's opinion in this case calls upon the Court now to decide whether there is any reason to give greater preclusive effect to the federal delay rule, found in Rule 9 of the Rules Governing Section 2254 Cases In The United States District Courts, than to the two California delay rules invoked in this case by the California Supreme Court.

The Ninth Circuit's finding of inadequacy is based on its subjective view that the substantive elements of California's timeliness bars failed to give Morales "adequate notice of when his claims would be barred." Morales v. Calderon, 85 F.3d at 1393. This is because, in the Court's view, "[n]either the Standards [found in the California Supreme Court Policies] nor Stankewitz['s substantial delay rule] . . . established what amount of delay the court would consider 'substantial' . . . ." Id. at 1391.

Rule 9's prohibition of delayed petitions likewise fails to give Morales any "notice of when his claims would be barred" and fails to establish "what amount of delay" is prohibited in federal court. However, a federal court is nonetheless bound to apply the rule and cannot read into the rule its own ad hoc "equitable" concerns of "fair" or "adequate" notice not found in the rule itself.

Lonchar v. Thomas, 517 U.S. ___, 134 L. Ed. 2d 440 (1996). Thus, this case calls upon the Court to decide whether a federal court may disregard a state's delay rules based on its own "equitable" concerns of "fair" or "adequate" notice not found in the state rules themselves where it would be prohibited from ignoring the federal delay rule based on its own "equitable" concerns of "fair" or "adequate" notice not found in the rule itself.

E. Certiorari Should Be Granted Because Only The Evasion And Pre-emption Formulation Of The Adequate State Ground Test Is Consistent With This Court's Prior Cases Regarding "Firmly Established" And "Strict" And "Regular" Enforcement Of State Procedural Rules

Third, in addition to the issues in this case pertaining to State sovereignty over criminal procedure and State interests in finality of criminal judgments, certiorari should be granted because the Court must explain, based on the procedural bars invoked here, that the "firmly established" and "strictly" or "regularly" followed formulations of the adequate state ground doctrine are themselves grounded in evasion principles. The Constitution simply does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error," Beck v. Washington, 369 U.S. 541, 554-55 (1961), and the Court has honored the States' invocation of procedural rules so long as the rules have not been invoked with "pointless severity," NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964), or as "an arid ritual of meaningless form," Wright v. Georgia, 373 U.S. 284, 291 (1963), or in a "novel" fashion designed to "thwart review" of federal questions, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958). see Barr v. City of Columbia, 378 U.S. at 149 (lunch counter sit-in

case citing Flowers, Wright, and Patterson in support of "strictly or regularly followed" requirement).

Here, the United States Court of Appeals for the Ninth Circuit did not find that the California Supreme Court's invocation of the timeliness bars was "pointless," or "meaningless," or severly "novel." Indeed, the court conceded that it had "no way of knowing" whether a series of "brief minute entries" in other capital habeas cases before the California Supreme Court revealed lack of strict and regular enforcement of the rules, and instead found that the elements of the rules did not give Morales "adequate notice of when his claims would be barred." Morales v. Calderon, 85 F.3d at 1392-93.

Thus, rules which the Court has formulated to deal with "pointless" or "meaningless" and severely "novel" interpretations of state law that evade review have now been applied by the Ninth Circuit to a state law invocation of timeliness bars against a state collateral attack made years after conviction and finality simply because the court views these discretionary rules, which at worst reflect judicial receptiveness, not hostility, to the presentation of federal claims, as not providing Morales "with adequate notice of when his claims would be barred." Morales v. Calderon, 85 F.3d at 1393. Thus, review is necessary so that the Court can hold that its pronouncements in Barr and its progeny were not intended to assure Morales "uniformity of judicial decisions" or "immunity from judicial error" or "adequate notice of when his claims would be barred."

CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: August 29, 1996.

Respectfully submitted,

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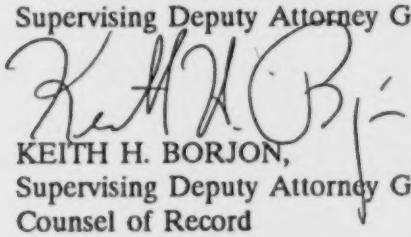

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellee.

No. 94-99010
D.C. No.
CV-91-00682-DT
OPINION

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
September 26, 1995—San Francisco, California

Filed June 4, 1996

Before: Jerome Farris, William C. Canby, Jr.,
and David R. Thompson, Circuit Judges.

Opinion by Judge Canby

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed and remanded a district court judgment. The court held that California's timeliness rule for filing habeas corpus claims, as applied prior to *In re Clark*, 855 P.2d 729 (Cal. 1993), was so unclear and inconsistently applied that it did not afford an adequate independent state ground barring federal review.

In 1983, a California jury convicted appellant Michael Morales of murder and sentenced him to death. The California Supreme Court affirmed on April 6, 1989. On June 6, 1989, the California Supreme Court adopted new standards for habeas corpus petitions arising from judgment of death for appeals pending and previously resolved (Standards).

In November 1989, the United States Supreme Court denied certiorari. Morales filed a habeas petition in federal court presenting 52 claims, including some extra-record claims discovered by his new counsel. The district court dismissed without prejudice the extra-record claims and ordered Morales to present those claims to the California Supreme Court. Morales filed a state habeas petition on December 16, 1992, over three years after his convictions were affirmed. In a brief, "post-card" denial, the California Supreme Court denied the petition for habeas relief on the merits and as untimely.

Morales filed an amended habeas petition in federal court raising the newly-exhausted claims. In April 1994, the federal court granted the state's motion to dismiss on the ground the claims were procedurally defaulted for untimeliness in state court. The court found that the California Supreme Court's procedural bars specifically invoked were adequate and independent state grounds that supported the California Supreme Court's judgment and that Morales had not rebutted the presumption against habeas review of claims defaulted in state court.

Morales appealed, arguing that the state denial of his claims was not based on an adequate and independent ground because the timeliness rule under the Standards was indeterminate and had been applied inconsistently. In support of his position, Morales asserted that the California Supreme Court had denied 35 habeas petitions filed three years after affirmance on direct appeal, and more than half of those denials had not been on grounds of untimeliness. Only 6 cases had

been denied on untimeliness alone. The state countered that uneven enforcement of the timeliness requirement was merely a reflection that discretion is involved in applying the rule and that states may apply their own neutral procedural rules to federal claims.

[1] Although the Standards make it clear that a petition for habeas corpus is presumed timely if filed within 60 (later 90) days, neither the Standards themselves, nor California cases construing those Standards create an unambiguous rule on timeliness beyond the 60 or 90 days. Further, because the California Supreme Court does not provide reasons for its denials of petitions of habeas corpus on timeliness grounds, it is difficult to discern what criteria the court applies when ruling on the timeliness of a petition filed beyond the 60 or 90 days.

[2] The first uncertainty in the Standards is in the requirement that petitions for habeas corpus should be filed "without substantial delay." If the petition is filed after substantial delay, then the petitioner must demonstrate equally uncertain "good cause."

[3] The California Supreme Court first attempted to explain its requirements under the Standards in *Clark*, but that case was not decided until after the California Supreme Court decided Morales's petition. [4] No opinion is expressed as to whether *Clark* succeeded in clearing up the uncertainties of timeliness under the Standards.

[5] There was so much variation in California's timeliness requirement before *Clark* that there was no discernible clear rule for petitions filed more than 90 days after the due date for the reply brief on direct appeal. [6] Invocation of a state rule that is applied only randomly does not preclude a federal court from entertaining a habeas petition on the merits. A state procedural ground is not adequate unless the rule is strictly or regularly followed. There is no requirement of a showing of manipulative intent on the part of the state court.

[7] The exercise of judicial discretion does not render a rule inadequate to support a state decision. But discretion is the exercise of judgment according to standards that, at least over time, can become known and understood within reasonable operating limits.

[8] The cases Morales relied on were decided by brief minute entries, so there is no way to know if the divergent decisions may indeed represent consistent exercises of discretion rather than random applications of the rule.

[9] The California Supreme Court's timeliness rule was not clear, consistently applied, and well-established at any time after Morales's convictions were affirmed and before he filed his first state habeas petition. Therefore, the rule cannot serve as an adequate and independent state ground sufficient to support a procedural default.

COUNSEL

Counsel David A. Senior, Condon & Forsyth, Los Angeles, California, for the petitioner-appellant.

Keith H. Borjon, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

Michael Angelo Morales, a California death-row inmate, appeals the federal district court's dismissal of the majority of the claims he presented in his first habeas corpus petition in district court. The district court dismissed the claims because the California Supreme Court had denied them not only on the

merits but also as untimely; they were therefore considered to be defaulted. This is an interlocutory appeal of the district court's ruling. We have jurisdiction pursuant to 28 U.S.C. § 1292(b) and F.R.A.P. 5(a). We reverse the district court's dismissal of the claims and remand for consideration of the merits because we find that the state court's denial of the claims was not based on an adequate and independent state ground that bars federal habeas review.

BACKGROUND

In 1983, a California jury convicted Morales of first-degree murder, among other charges, and sentenced him to death. The California Supreme Court affirmed the convictions and sentence by opinion on April 6, 1989, amended June 1, 1989. *People v. Morales*, 770 P.2d 244 (Cal.), *cert. denied*, 493 U.S. 984 (1989). On June 6, 1989, the California Supreme Court adopted new policies regarding death penalty cases, including "Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to such Petitions." *See* Supreme Court Policies Regarding Cases Arising from Judgments of Death, in California Rules of Court – State 745-46 (1990) (hereinafter "Standards").[1] These Standards, effective June 6, 1989, governed "all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved." Standards, Policy 3 at 745.

In November 1989, the United States Supreme Court denied certiorari in Morales's case. Thereafter, Morales obtained new counsel who filed a petition for writ of habeas corpus on July 20, 1992, in federal district court. Morales presented 52 claims.[2] Twenty of these claims were exhausted

[1]In July 1993, the California Supreme Court revised the Standards. *See In re Clark*, 855 P.2d 729, 751 n.18 (Cal. 1993). The amended Standards were published as an appendix to *Clark*. *Id.* at 762-64.

[2]The federal district court, in its April 29, 1994 Order dismissing Morales's first amended petition for writ of habeas corpus, incorrectly stated that Morales presented 53 rather than 52 claims.

in the automatic state appeal and raised issues from the trial record. The other claims involved issues that arose from facts outside the record and were discovered by Morales's new counsel.

The district court dismissed the 32 extra-record claims without prejudice and ordered Morales to present those claims to the California Supreme Court.[3] On December 16, 1992, approximately three and one-half years after his convictions were affirmed, Morales filed his first petition for writ of habeas corpus in the California Supreme Court. The petition raised the 32 extra-record claims and one additional, newly-discovered claim. Morales later filed a supplemental petition, which the court treated as a separate habeas corpus petition, raising three additional claims based on newly discovered facts, and presenting newly discovered facts supporting three of the claims raised in the December 16 petition.

The California Supreme Court denied all relief on both petitions, issuing two orders on July 28, 1993, that both stated:

> Petition for writ of habeas corpus DENIED on the merits and as untimely. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal.3d 391, 396, fn.1.)[.]

The order dismissing the December 16 petition also stated: Mosk, J. is of the opinion that an order to show cause should issue.

Morales then filed his first amended petition for writ of habeas corpus in federal district court, raising the newly-exhausted claims and two more claims attacking the constitu-

[3]The State has since filed in federal district court an answer to the remaining 20 claims that were exhausted in the direct appeal.

tionality of the California death penalty statute.[4] Morales also re-alleged the 20 claims from the first petition, which the State had already answered and Morales had traversed.

In April 1994, the district court granted the State's motion to dismiss. The district court dismissed the newly-exhausted claims on the ground that they were procedurally defaulted for untimeliness in state court.[5] The district court also dismissed the 20 claims already before it from the first petition, noting that these claims were already under consideration.

The district court found that "the California Supreme Court's procedural bars specifically invoked in this case" were adequate and independent state grounds that supported the Supreme Court's judgment. The district court further found that Morales had "failed to make any particularized showing of cause and prejudice or a fundamental miscarriage of justice to overcome the 'presumption against federal habeas review of claims defaulted in state court.' " *See Coleman v. Thompson*, 501 U.S. 722, 747 (1991). The court granted Morales's request to make a more particularized showing of either cause and prejudice or a fundamental miscarriage of justice.

Morales moved for reconsideration in light of *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1175 (1995), decided after the district court had entered its order of dismissal. The district court denied the motion.

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[4]Both of the arguments challenging the constitutionality of the statute have since been rejected by the United States Supreme Court. *See Tuilaepa v. California*, 114 S. Ct. 2630, 2636-39 (1994) (holding that California death penalty special circumstances were not unconstitutionally vague); *Victor v. Nebraska*, 114 S. Ct. 1239, 1251 (1994) (holding that jury instructions defining "reasonable doubt" did not violate Due Process Clause).

[5]The court also dismissed the two claims attacking the death penalty statute, but Morales does not contest this ruling on appeal.

The district court granted Morales's motion to certify the dismissal of these claims for interlocutory appeal, and we granted permission to appeal pursuant to F.R.A.P. 5(a) and 28 U.S.C. § 1292(b). The district court's certification order stayed further briefing of the questions whether, assuming a default, Morales had shown cause and prejudice or a fundamental miscarriage of justice; those issues consequently are not before us.

ISSUE

The issue for our decision is whether the California Supreme Court's timeliness requirement serves as an adequate and independent state ground for its decision dismissing Morales' petition. If it does, Morales has defaulted procedurally on the affected claims and cannot raise them in federal court unless he shows cause and prejudice or a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750.[6]

ANALYSIS

Morales argues that the state denial of his claims was not based on an adequate and independent ground barring federal review because (1) the California Supreme Court's habeas corpus timeliness Standards are facially indeterminate, (2) the Supreme Court has applied the Standards with a lack of even-handedness, and (3) the Supreme Court's orders of denial are ambiguous and dependent on federal claims. The State, on the other hand, insists that the Standards are adequate neutral rules of judicial administration that, as applied in this case, bar federal review.

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[6]The district court's dismissal of the petition for writ of habeas corpus on the ground of state procedural default involves an issue of law that we review *de novo*. *Hunter v. Aispuro*, 982 F.2d 344, 346 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 240 (1993).

There is usually no doubt that the decision of a state supreme court rests on an adequate and independent state ground when the court's opinion clearly and expressly states that its decision is based on a state procedural rule. *See Coleman*, 501 U.S. at 735-36 (citing *Harris v. Reed*, 489 U.S. 255, 263 (1989)). A state procedural rule does not bar federal review, however, if it is so unclear that it does not "provide[ ] the habeas petitioner with a fair opportunity to seek relief in state court." *Harmon v. Ryan*, 959 F.2d 1457, 1462 (9th Cir. 1992). Nor can a state preclude federal review by invoking procedural rules that the state does not apply consistently. *See Hathorn v. Lovorn*, 457 U.S. 252, 262-63 (1982). We conclude that the California timeliness standard, as applied to Morales, suffers from both of these deficiencies.

I. Uncertainty of California's Timeliness Standards

[1] We find it difficult to articulate California's timeliness requirements as they applied to Morales. The Standards make it clear enough that a petition for habeas corpus is presumed timely if filed within 60 (later 90) days of the final due date of the petitioner's reply brief on direct appeal. Standards § 1-1.2, but Morales's appeal had already been decided at the time the Standards were announced. Neither the Standards themselves nor California cases construing those Standards create an unambiguous rule on timeliness beyond the 60 or 90 days. Further, because the California Supreme Court does not provide reasons for its denials of petitions of habeas corpus on timeliness grounds, it is equally difficult to discern what criteria the state court applies when ruling on the timeliness of a petition filed beyond the 60 or 90 day period.

The Standards, in pertinent part, state:

> 1. Timeliness standards
>
> 1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds

for the filing of a petition for a writ of habeas corpus. All petitions for writs of habeas corpus should be filed *without substantial delay.*

1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 days after the final due date for the filing of appellant's reply brief on the direct appeal.[7]

1-1.2. A petition filed more than 60 days after the final due date for the filing of appellant's reply brief on the direct appeal *may* establish absence of substantial delay if it alleges *with specificity* facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim.

1-1.3. Alternatively, a petition *may* establish absence of substantial delay if it alleges *with specificity* facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1), the petition was filed within a *reasonable time* after that date.

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate *good cause* for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

---

[7]Effective September 1990, this period of time was extended to 90 days. *See* California Rules of Court – State (1995) at 982.

1-3. Any petition that fails to comply with these requirements *may* be denied as untimely.

Standards at 745-46 (emphasis added).

[2] The first uncertainty in these Standards inheres in the requirement that petitions for habeas corpus should be filed "without substantial delay." If the petition is filed after substantial delay, then the petitioner must demonstrate similarly uncertain "good cause" for the delay. The source of these requirements is, in part, a footnote in *In re Stankewitz*, 708 P.2d 1260, 1262 n.1 (Cal. 1985) (explaining that petitioner "must point to particular circumstances sufficient to justify substantial delay"). In that case, the petitioner filed his first habeas corpus petition a year and a half after obtaining newly-discovered evidence, while direct review of his murder conviction and death sentence was still pending. *Id.* at 1261, 1262 n.1. The California Supreme Court held that petitioner had made a sufficient showing of justification for delay. *Id.* at 1262 n.1. Neither the Standards nor *Stankewitz*, however, established what amount of delay the court would consider "substantial," nor did either set out criteria for determining "good cause" to excuse such delay. They also did not prescribe whether and when untimeliness might be waived altogether, even though good cause had not been shown.

[3] The vagueness of the Standards could have been cured by narrowing judicial construction in the years immediately following their issuance. We find no such cases, however. The California Supreme Court did attempt to explain at great length its requirements under the Standards in *In re Clark*, 855 P.2d 729 (Cal. 1993), but *Clark* was not decided until a few days after the California Supreme Court denied Morales's petition.

Clark asserted that a petitioner whose conviction was affirmed before announcement of the Standards was nevertheless on notice of the delay rules per *Stankewitz*. *Id.* at 750.

Thus, "any substantial delay in the filing of a petition after the factual and legal bases for the claim are known or should have been known must be explained and justified." *Id.* at 752. *Clark* also stated, however, that "counsel's obligation to investigate possible claims was created only by the [Standards]," and consequently claims discovered after investigation commencing after the date of publication of the Standards (June 6, 1989) and presented promptly thereafter are timely. *Id.*

[4] Despite *Clark*'s emphasis on the duties of counsel that pre-existed the Standards (as well as the *Clark* opinion itself), *Clark* did acknowledge that "no clear guidelines [regarding departure from the habeas corpus rules] have emerged in our past cases." *Id.* at 737. *Clark* was an attempt to clear up such uncertainties. We need express no opinion on whether the attempt succeeded, so that timeliness under the Standards invoked post-*Clark* would constitute an adequate and independent state ground of decision; Morales's petition was denied before *Clark*.

[5] We find so much variation in application of California's timeliness requirements before *Clark* that we conclude that no discernible clear rule then existed for petitions filed more than 90 days after the due date of the reply brief on direct appeal. For example, Morales asserts that at the time his case was litigated in the district court, the California Supreme Court had denied 35 habeas petitions filed three years or more after affirmance on direct appeal, and more than half of those denials had not been on grounds of untimeliness. Only 6 cases had been denied on untimeliness alone. The State does not dispute these figures, but asserts that uneven enforcement of the timeliness requirement is simply a reflection of the fact that some discretion is involved in applying the rule. According to the State, the kinds of variation demonstrated by Morales do not call the rule into question unless there is a showing of deliberate manipulation to avoid federal review. The State relies upon *Howlett v. Rose*, 496 U.S. 356 (1990), which stated that

"States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Id.* at 372.

We cannot accept the State's contention as it is put forth, nor do we find *Howlett* apposite. *Howlett* involved the question whether a state defense of sovereign immunity to a federal-law claim could be available in state court when it would not be so in federal court. The concern was that the state was discriminating against a federal cause of action, and the Court's neutrality ruling was simply a response to that concern. The actual holding in *Howlett* was that the state immunity rule was substantive and preempted by federal law. *Id.* at 375-81.

[6] Neutrality is not enough when a rule is applied or not applied wholly at random. We must emphasize that the issue here is not whether the State is allowed to invoke its rule irregularly for its own purposes. The question is whether invocation of a state rule that is applied only randomly may preclude a federal court from entertaining a petitioner's federal claim on the merits. We conclude that the answer to that question is "no." The Supreme Court has stated that "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' " *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)). The Court has added no requirement of a showing of manipulative intent on the part of the state court.

[7] It is true, as the State argues, that procedural rules need not be utterly mechanical. That the application of a rule requires the exercise of judicial discretion does not render the rule inadequate to support a state decision. In fact, a bright-line rule for delay can operate more harshly than a discretionary rule. *See, e.g., Coleman*, 501 U.S. at 727-29 (affirming dismissal of claims barred in state court because petition filed three days late). But judicial discretion is the exercise of judg-

ment according to standards that, at least over time, can become known and understood within reasonable operating limits. To bar federal review, a state procedural rule must be "consistently applied." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994).

[8] It is theoretically possible, we suppose, to reconcile and explain all of the California Supreme Court decisions entertaining on the merits or rejecting as untimely petitions that are three or more years old. Those divergent decisions may indeed represent consistent exercises of discretion rather than random applications of or exceptions to the timeliness rule. But we have no way of knowing whether that is the case. The California Supreme Court's denials of habeas petitions that Morales relies upon were accomplished by brief minute entries in what has been described as "post-card denial." We can discern no apparent relationship between the time of delay and the findings concerning timeliness. Nor could Morales be expected to do so.

We faced a similar problem in *Siripongs v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994), where we held that the district court's dismissal of petitioner's claims in a successive habeas petition on procedural grounds was error. We ruled that a state procedural rule that is discretionary and not applied consistently "cannot act as a bar to federal review. . . . [T]he federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce." *Id.*

In *Siripongs*, the California Supreme Court had not identified a particular procedural rule that it relied on for default, as it did in Morales's case.[6] We noted this deficiency, holding that a procedural default based on an ambiguous order that

[6]The order at issue in *Siripongs* stated:

> Petition for writ of habeas corpus DENIED both for reasons of procedural default and on the merits. Petitioner's motion for "post trial discovery" is denied. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261).

Siripongs, 35 F.2d at 1316.

does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review. *Id.* at 1317-18. We also relied, however, on the fact that, at the time the habeas petition was denied by the state court, the state procedural rules regarding filing of successive petitions were not consistently enforced. *Id.* at 1318. Indeed, we recognized that "the strict standards announced in [*Clark*] did not guide the California courts in 1991, when Siripongs' state petition was denied." *Id.* We conclude that the latter rationale of *Siripongs* is fully applicable here. Here, as in *Siripongs*, we find that the state court's procedural rule was not consistently enforced at the time Morales's petitions were denied. Although the State and the district court distinguish *Siripongs* because it involved a successive petition for habeas review, that fact casts no doubt upon Siripongs' general principle of consistent enforcement of a procedural bar. Nor is *Siripongs* our first endorsement of that principle: "In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells*, 28 F.3d at 1010.

We note that two district courts in this circuit have reached the same conclusion we do with regard to the particular rule at issue in this case. In *Karis v. Vasquez*, 828 F. Supp. 1449, 1463 (E.D. Cal. 1993), the petitioner had filed a successive habeas petition in the California Supreme Court and had failed to explain or justify his delay. The state court summarily dismissed his claims. The district court held that "California's rule concerning delay as a bar to habeas is standardless both substantively and as to duration," did not provide petitioner with adequate notice of when his claims would be barred, and consequently did not bar federal relief. *Id.* at 1464; *cf. Odle v. Calderon*, 884 F. Supp. 1404, 1413-14 (N.D. Cal. 1995). The *Karis* court explained that discretion *per se* does not invalidate a state rule as an independent and adequate state ground, if the discretion is exercised according to clear and articulated standards. *See Karis*, 828 F. Supp. at

1463-64. On the other hand, if it is exercised in an " 'ad hoc rather than a principled basis,' " it does not bar federal review. *Id.* at 1463. (citation omitted).

[9] We conclude that California's rule on timeliness was not "clear, consistently applied, and well-established" at any time after Morales's convictions were affirmed and before he filed his first state habeas petition. *See Wells*, 28 F.3d at 1010. It consequently cannot serve as an adequate and independent state ground sufficient to support a procedural default. *See id.*

II. Independence of the State Procedural Ground

Morales argues in the alternative that, even if all the claims were properly denied on procedural grounds, these grounds were not clearly independent of the rulings on the merits. Federal habeas review is not barred if the state decision " 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law.' " *Coleman*, 501 U.S. at 735 (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)). Morales argues that the California Supreme Court's procedural rulings were interwoven with the federal claims because (1) the orders state that the claims are denied also on the merits and (2) the state court's conclusions about timeliness entailed a consideration of the merits. Because we conclude that the timeliness Standards themselves as applied to Morales are not an adequate and independent ground barring federal review, we need not address these arguments.

CONCLUSION

We reverse the district court's dismissal of Morales's federal habeas corpus claims, which were denied by the California Supreme Court as untimely. We hold that the California Supreme Court's timeliness rule, as applied to Morales and before its further elucidation in *Clark*, did not afford an adequate and independent state ground barring federal review of Morales's claims. We express no opinion as to whether the

California Supreme Court has sufficiently narrowed the timeliness standards or applied them consistently since *Clark*.

We remand this matter to the district court for consideration of Morales's claims on the merits.

ORDER REVERSED; CASE REMANDED.

APPENDIX B

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FILED
APR 22 1994
Clerk, U.S. District Court
Central District of California
By Deputy

ENTERED
Clerk, U.S. District Court
APR 29 1994
Central District of California
By Deputy

CAPITAL CASE

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES,

Petitioner,

v.

DANIEL VASQUEZ, as Warden of San Quentin State Prison,

Respondent.

CV 91-0682-DT

~~[PROPOSED]~~ ORDER DISMISSING WRIT OF HABEAS CORPUS AND SCHEDULING FIRST AMENDED HABEAS CORPUS AND SUPPLEMENTAL BRIEFING

On April 11, 1994, respondent's motion to dismiss petitioner's first amended petition for writ of habeas corpus came for hearing. After consideration of the written motion and points and authorities, petitioner's opposition, respondent's reply, all exhibits, the oral argument of counsel, and the record in this case, the Court hereby **GRANTS** respondent's motion to dismiss the first amended petition for writ of habeas corpus for the reasons set forth in this order. The Court also requires supplemental briefing as set forth in this order.

On April 7, 1983, a jury in the Superior Court of California for the County of Ventura convicted petitioner of the first degree murder of Terri W., conspiracy to commit the murder of Terri W., and the rape of Terri W. The jury further found true two death-eligible special circumstances, (1) that petitioner intentionally tortured Terri W., and (2) that petitioner had committed the murder by means of lying-in-wait.

On April 25, 1983, that same jury found that the aggravating factors outweighed the mitigating factors and returned a death verdict.

On June 14, 1983, the Superior Court denied petitioner's motion to reduce the verdict from death to life without parole.

On June 1, 1989, the California Supreme Court affirmed the judgment of conviction and sentence in its entirety except that it reversed a trial court ruling of a judgment n.o.v.

On November 27, 1989, the United States Supreme Court denied certiorari.

On July 20, 1992, petitioner filed a petition for writ of habeas corpus in this Court raising 53 claims.

On September 28, 1992, respondent filed a motion to dismiss the petition for writ of habeas corpus.

On November 16, 1992, the Court granted in part respondent's motion to dismiss, dismissing 33 of the claims in the petition, and ordering an answer to the remaining 20 claims in the petition.

On December 27, 1992, respondent filed an answer to the 20 claims and a memorandum of points and authorities in support thereof.

On December 16, 1992, petitioner filed a petition for writ of habeas corpus in the California Supreme Court.

In April, 1993, petitioner filed a "supplemental" petition for writ of habeas corpus.

On July 28, 1993, the California Supreme Court denied petitioner's two habeas corpus petitions in separate identical orders that read:

> "Petition for writ of habeas corpus DENIED on the merits and as untimely. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal.3d 391, 396, fn.1.)
>
> "Mosk, J. is of the opinion that an order to show cause should issue."

On January 14, 1994, petitioner filed a first amended petition for writ of habeas corpus. This amended petition raises 37 claims that were raised in the California Supreme Court in the December 1992 and April 1993 habeas petitions. The amended petition also contains 2 claims, which contain 4 subclaims, that have never been presented by petitioner to any state or federal court. The amended petition also realleges the 20 claims from petitioner's first petition for writ of habeas corpus that have already been answered by respondent and traversed by petitioner.

On March 14, 1994, respondent filed a motion to dismiss the entire first amended petition for writ of habeas corpus. The Court grants the motion as follows:

IT IS ORDERED that Claims Number 1 through 15, 17, 19, 24, 26 through 30, 33 through 42, 50, 55, 58, and 59 are dismissed as procedurally barred. The Court finds that these particular claims were raised in the California Supreme Court in the habeas corpus petitions filed in that court in December

1992 and in April 1993. The Court finds that the two California Supreme Court orders in each of those two cases clearly and explicitly denied all of petitioner's 37 state habeas corpus claims "as untimely."

In denying relief "as untimely," the California Supreme Court cited the California "Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal.3d 391, 396, fn.1." The Supreme Court Policies Regarding Cases Arising from Judgments of Death, Standards 1-1.1 to 1-3, [Policies] refer to the time requirements in capital cases on appeal and on habeas corpus in the California Supreme Court that were adopted in June 1989. The policies imposed an explicit duty to investigate possible habeas corpus claims without delay "regardless whether the appeals therefrom are pending or previously resolved." Policies, std. 1-1.1. The policies also took into account longstanding California case law that any significant delay in seeking collateral relief must be fully justified by particular facts establishing good cause for the delay. In re Stankewitz, 40 Cal.3d 391, 396-97 fn.1, 220 Cal.Rptr. 382 (1985); In re Swain, 34 Cal.2d 300, 304, 209 P.2d 793 (1949). Policies, std. 1-1.3. Stankewitz is the only other authority cited by the California Supreme Court in each of the two orders issued in this case on July 28, 1993. Neither the policies nor Stankewitz involve the application federal constitutional law precepts. They involve only state procedural requirements for the filing of habeas corpus petitions in both capital and non-capital cases.

Preliminarily, petitioner argues that the California Supreme Court's policies respecting capital cases may not be enforced by this Court as "rules" of state procedure because the Policies themselves were created by the California Supreme Court in excess of the California Supreme Court's jurisdiction. The Court rejects this argument. The Court has no authority to define the jurisdiction of the California Supreme Court. Estelle v. McGuire, ___ U.S. ___, ___, 112 S.Ct. 475, 480, 116

L.Ed.2d 385 (1991). Therefore, the Court will not question the authority of the California Supreme Court to create and enforce the Policies. In addition, it appears that the California Supreme Court has already held that California's habeas corpus statute, California Penal Code section 1475, "does not compel courts to consider successive petitions, nor does it purport to restrict the court's inherent power to control its calendar and prevent abuse of the writ." In re Clark, 5 Cal.4th 750, 771, 21 Cal.Rptr. 509 (1993).

The Court finds that the California Supreme Court's orders explicitly denying petitioner's 37 habeas corpus claims "as untimely" are independent of federal law. The Court finds that the two California Supreme Court orders are worded in a manner approved by the United States Supreme Court in Harris v. Reed, 489 U.S. 255, 264 fn.10, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). The California Supreme Court's additional denials of the petitions on "the merits" does not invalidate the independence of the procedural rulings. Ibid.

The Court rejects petitioner's argument that the California Supreme Court's orders invoking untimeliness bars to petitioner's 37 claims are dependent on federal law because California law allows its courts to forgive defaults to review exceptional or compelling constitutional claims. Petitioner argues that the existence of this state law exception makes the application of the procedural bar interwoven with federal law, and therefore dependent upon federal law. The Court rejects this argument for two reasons. First, the Court is not required to examine the orders for the "interweaving" of state and federal law unless "'it fairly appears that the state court rested its decision primarily on federal law.'" Colemen v. Thompson, supra, 501 U.S. at __, 111 S.Ct. at 2557, 115 L.Ed.2d 640. Nothing on the face of the two orders or in the state court record of those two cases give this Court any basis to find that the California Supreme Court decided the cases "the way it did because it believed that federal law required it to do so." Id., at 2556. This Court will not look for the interweaving of

federal and state law "[i]n the absence of a clear indication that . . . [the] state court rested its decision on federal law.l" Coleman v. Thompson, supra, 501 U.S. at ___, 111 S.Ct. at 2557, 115 L.Ed.2d 640.

The Courts also rejects petitioner's argument on its merits. To the extent that California law allows its state courts to forgive habeas corpus procedural defaults and examine the merits of exceptional or compelling federal constitutional claims, the Court finds no basis to conclude that this rule is a creation of federal law or the rule's enforcement is compelled by federal law. The Court finds that the most reasonable explanation that the California Supreme Court found petitioner's state habeas corpus claims untimely is because it believed that state law, not federal law, required it to do so. Coleman v. Thompson, supra, 501 U.S. at ___, 111 S.Ct. at 2556, 115 L.Ed.2d 640.

The Court finds the California Supreme Court's procedural bars specifically invoked in this case are adequate to support its judgment. The Court specifically rejects petitioner's assertion that California's delay rule is completely without parameters. The Court finds that California law explicitly provides for an exception to the delay rule when a habeas corpus petitioner is acting as his own counsel, is uneducated, and is lacking knowledge of the law. See In re Saunders, 2 Cal.3d 1033, 1040, 88 Cal.Rptr. 633 (1970); In re Streeter, 66 Cal.2d 47, 52, 56 Cal.Rptr. 824 (1967); In re Perez, 65 Cal.2d 224, 228, 53 Cal.Rptr. 414 (1966). The court finds that petitioner has been represented by counsel in the California Supreme Court continuously throughout his appeal to date, and for that reason, appears to fall outside this exception identified under California law. The Court has found no published decision of the California Supreme Court that has ever excepted habeas corpus petitioners who are represented by counsel from its delay rule.

The Court also rejects petitioner's argument that California's delay rule is inadequate because it is discretionary.

See Karis v. Vasquez, 838 F.Supp. 1449, 1462-64 (E.D. Cal. 1993). This Court "'takes state courts as it finds them'" (Howlett v. Rose, 496 U.S. 356, 372, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990)) because it is "not empowered by the Constitution to oversee or harness state procedural experimentation" (Chandler v. Florida, 449 U.S. 560, 582, 101 S.Ct. 563, 66 L.Ed.2d 740 (1981)).

The adequate state ground doctrine is an issue of constitutional law under the Supremacy Clause of the Constitution that "accords respect to state courts as decision makers by honoring their modes of procedure." Howlett v. Rose, 496 U.S. 356, 370, 367-68, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990); United States v. Burnison, 339 U.S. 87, 94, 70 S.Ct. 503, 94 L.Ed. 675 (1950). Neutral discretionary rules of judicial administration may form a "valid excuse for a state court's refusal to entertain a federal cause of action." Howlett v. Rose, supra, 496 U.S. at 374, 110 S.Ct. 2430, 110 L.Ed.2d 332; Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929).

A neutral state rule of judicial procedure may violate the Supremacy Clause of the Constitution "[w]hen a state refuses to hear pleas based on federally created rights while it takes cognizance of those created by state law[.]" United States v. Burnison, supra, 339 U.S. at 94, 70 S.Ct. 503, 94 L.Ed. 675. This type of disparate treatment may violate the Supremacy Clause of the Constitution since a "cause of action must not be discriminated against because it is a federal one." Herb v. Pitcairn, 324 U.S. 117, 123, 65 S.Ct. 459, 89 L.Ed. 789 (1945). Under such circumstances, "the state court may be evading federal law and discriminating against federal causes of action." Howlett v. Rose, supra, 496 U.S. at 366, 110 S.Ct. 2430, 110 L.Ed.2d 332; Demorest v. City Bank Co., 321 U.S. 36, 42, 64 S.Ct. 384, 88 L.Ed. 526 (1944); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540, 50 S.Ct. 401, 74 L.Ed. 1023 (1930) .

The Court finds no evidence that the procedural bars invoked in this case were "set up as an evasion" (Rogers v. Alabama, 192 U.S. 226, 231, 24 S.Ct. 257, 48 L.Ed. 417 (1904)) by the California Supreme Court or reflect an "intent to avoid the Federal questions" (Vandalia Railroad v. South Bend, 207 U.S. 359, 367, 28 S.Ct. 130, 52 L.Ed. 246 (1907)).

Petitioner's showing that the California Supreme Court has not invoked procedural bars against other state habeas corpus petitioners presenting federal constitutional claims does not reveal any improper "discrimination" under the Supremacy Clause against federal constitutional claims. To the extent that California law and the practice of the California Supreme Court may allow unjustifiably delayed federal constitutional claims to be heard on the merits, the law and the practice reflect state judicial receptiveness to, not hostility toward, the presentation of federal constitutional claims.

"A state ground that is solidly established will be respected even though not 'strictly' followed. Any other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others." Prijoda v. McCaughtry, 910 F.2d 1379, 1384 (7th Cir. 1990). "Uncertainty is not enough to disqualify a state procedural rule as one 'adequate' under federal law. If it were, states would be induced to make their rules draconian rather than to allow prisoners the latitude now available." Id. at 1385.

The Court finds petitioner's attack on California law unpersuasive because petitioner has, in effect, asked this Court to penalize the California Supreme Court for creating and applying neutral discretionary rules of procedure that sometimes allow otherwise untimely federal constitutional habeas claims to be heard on the merits. This Court has neither the authority nor the desire to induce the California Supreme Court to make its habeas corpus rules "draconian

rather than to allow prisoners the latitude now available." Prijoda v. McCaughtry, supra, 910 F.2d at 1385.

IT IS FURTHER ORDERED that Claims Number 31 and 32, which contain 4 subclaims, are dismissed as procedurally defaulted for the same reasons that the 37 claims have been defaulted. Given the California Supreme Court's explicit orders denying petitioner first two petitions for writ of habeas corpus in that court, the court finds a reasonable basis to conclude that all of the six claims contained in Claims Number 31 and 32 are likewise procedurally defaulted as untimely under California law. For the same reasons outlined as to petitioner's 37 claims described above, these six claims are dismissed.

The Court further finds that petitioner has failed to make any particularized showing of cause and prejudice or a fundamental miscarriage of justice to overcome the "presumption against federal habeas review of claims defaulted in state court." Coleman v. Thompson, supra, 501 U.S. at ___, 111 S.Ct. at 2563, 115 L.Ed.2d 640. Despite these failings, the Court grants petitioner's request in open court to make a more particularized showing of either cause and prejudice or a fundamental miscarriage of justice. McCleskey v. Zant, 499 U.S. ___, ___, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 544 (1990); Sawyer v. Whitley, 505 U.S. ___, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Petitioner may file a brief addressing these issues on or before July 29, 1994.

IT IS FURTHER ORDERED that Claims Number 16,18, 20 through 23, 25, 43 through 49, 51 through 54, 56, and 57 are dismissed because they are already before this Court in petitioner's petition for writ of habeas corpus filed on July 20, 1992. These claims have already been answered on the merits,

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traversed, and are under consideration by this Court. Petitioner may file supplemental briefing on these 20 claims on or before July 29, 1994. The Court will then decide if additional hearings or briefing is necessary.

Dated: APR 22 1994.

DICKRAN TEVRIZIAN

DICKRAN TEVRIZIAN
United States District Court Judge

Presented by:

"s/Keith H. Borjon".
KEITH H. BORJON, Supervising
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Attorney for Respondent

APPENDIX C

CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH

As Adopted on June 6, 1989

POLICY 1. STAYS OF EXECUTION

The court will consider a motion for a stay of execution only if such a motion is made in connection with a petition for

a writ of habeas corpus filed in the court, or to permit certiorari review by the United States Court.

POLICY 2. WITHDRAWAL OF COUNSEL

The court will consider a motion to withdraw as attorney of record only if appropriate replacement counsel is ready and willing to accept appointment for appropriate postappeal representation related to the case.

POLICY 3. STANDARDS GOVERNING FILING OF HABEAS CORPUS PETITIONS AND COMPENSATION OF COUNSEL IN RELATION TO SUCH PETITIONS

For the reasons expressed therein, the court has adopted the following standards:

STANDARDS FOR PREPARATION AND FILING OF HABEAS CORPUS PETITIONS RELATING TO CAPITAL CASES AND FOR COMPENSATION OF COUNSEL IN CONNECTION WITH THOSE PETITIONS

The Supreme Court promulgates these standards as a means of implementing the following goals with respect to petitions for writs of habeas corpus relating to capital cases: (i) ensuring that potentially meritorious habeas corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses, and (iii) providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to investigate and file habeas corpus petitions.

For these reasons, effective June 6, 1989, all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved, are governed by these standards:

1. Timeliness standards

1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. All petitions for writs of habeas corpus should be filed without substantial delay.

1-1.1 A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 days after the final due date for the filing of appellant's reply brief on the direct appeal.

1-1.2 A petition filed more than 60 days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim.

1-1.3 Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1), the petition was filed within a reasonable time after that date.

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

2. Compensation standards

2-1. This court's appointment of counsel for a person under a sentence of death is for the following: (i) pleadings and proceedings related to preparation and certification of the appellate record; (ii) representation in the direct appeal before the California Supreme Court; (iii) preparation and filing of

habeas corpus petitions and other ancillary pleadings in the California Supreme Court; ((iv) preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court; (v) representation in the trial court relating to proceedings pursuant to Penal Code sections 1193 and 1227; and (vi) preparation and filing of a petition for clemency with the Governor of California no earlier than after exhaustion of the initial round of collateral challenges in federal court. Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition or pleading in any other California or federal court or court of another state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court.

2-2. Appellate counsel should expeditiously investigate possible bases for filing a petition for a writ of habeas corpus. As a general rule, this investigation should be done concurrently with review of the appellate record and briefing on appeal. Requests by appointed counsel for investigation expenses shall be governed by the following standards:

2-3. On or before the date the appellant's opening brief on appeal is filed, or within 120 days after the date on which these standards are announced, whichever is later, counsel shall file with this court a "Confidential request for expenses to investigate potential habeas corpus issues." The court will entertain an initial request filed at a later time only if good cause for the delay is shown.

2-4. The confidential request for expenses shall set out:

2-4.1 The issues to be explored;

2-4.2 Specific facts that suggest there may be an issue of possible merit;

2-4.3 An itemized list of the expenses requested for each issue of the proposed habeas corpus petition; and

2-4.4 If applicable, an itemized listing of the fees and expenses previously submitted to, or approved or paid by, this

court in connection with the present (or any previous related) habeas corpus proceeding or investigation.

2-5. If the confidential request for expenses appears both timely and reasonable, the court will grant it in whole or in part. Except when good cause is shown, this court will not reimburse counsel for expenses that have not been previously approved by this court.

2-6. On presentation of an accounting of the fees and expenses incurred for production of the confidential request for expenses, the court will reimburse counsel up to $3,000 for reasonable expenses and legal fees associated with preparing that request. Prior authorization will not be required for reimbursement of these fees and expenses. Counsel may include this accounting as an attachment to the confidential request. In exceptional circumstances, counsel may request reimbursement for fees and expenses exceeding $3,000.

2-7. Counsel generally will not be awarded compensation for fees and expenses relating to matters that are clearly not cognizable in a petition for a writ of habeas corpus.